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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### TELEVISION AND TORTS

To the common misconception that a lawyer's livelihood depends upon a search for cases upon dusty shelves among musty books, science is about to add another lie. Television, or TV as it is familiarly known, has "arrived."

With the advent of the railroad, came the "last clear chance" and "humanitarian" doctrines. Radio brought a new form of "publication" and "dissemination."

The air age has been replete with new ideas and theories ranging from the question of whether or not trespass will lie for an entry two hundred feet up, to the recently discussed question of property in rain clouds.<sup>1</sup> Now in the "brave new world" of 1950, the dynamic legal profession must adapt itself to television!

The knotty scientific-legal questions of broadcast frequencies, patent rights or even a determination of the question of whether or not color television should receive the "green light," will not concern the average attorney, teacher or student. But the tort field appears to be in for a deluge of litigation as resourceful lawyers are already attempting to obtain redress for their clients whose rights have been invaded by a new medium of libel and slander,<sup>2</sup> or who have suffered the tort of "invasion of privacy" by the all-encompassing eye of the TV camera. It is in the invasion of privacy field that new doctrines and rules of liability are most likely to be necessary; but even the well recognized and formulated elements of libel and slander may be due for an overhaul.

#### LIBEL AND SLANDER

While it is not definitely settled, there is strong authority for the proposition that a libel acted out in a pantomime will give rise to a cause of action.<sup>3</sup>

A common generalization is that libel is that which is communicated by the sense of sight while slander is conveyed by the sense of hearing.<sup>4</sup> From these authorities it may be said that defamation by use of the television camera would give rise to a cause of action for libel and not slander. The distinction is important since in maintaining an action for libel it is necessary to allege and prove special damages. (It is necessary to allege and prove special damages in bringing an action for slander except in the case of a few stereotyped situations where damage is presumed.<sup>5</sup>) Further support for the proposition that defamation by television amounts to libel is found in the radio cases which hold that defamatory words

1. *Who Owns the Clouds*, [1948] STANFORD L. REV. 43.

2. St. Louis Globe Democrat, June 8, 1949, p. 1, col. 3; Dorothy Kirsten, Metropolitan Opera star, stated in Hollywood that she would sue Milton Berle, frequently called television's number one star, as the result of a TV skit on Berle's program, in which a woman performer was introduced in a number from *La Traviata* to sing it "as Kirsten would do it."

3. *Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 152 Wis. 537, 139 N.W. 386 (1913). The "rough shadowing" of *P* by detectives was held to constitute a tort which would sustain an action for damages. The court evidently found liability on a theory of libel rather than for any invasion of privacy since the Wisconsin courts do not favor a recovery for invasion of privacy; *Johnson v. Commonwealth*, 22 Wkly. Notes Cas. 68, 14 Atl. 425 (Pa. 1888) (plaintiff hung in effigy); *De Libellis Famosis*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (1605) (erecting a gallows before plaintiff's door).

4. *Burton v. Crowell Pub. Co.*, 82 F. 2d 154 (C.C.A. 2d 1936) (pictures); *Brown v. Paramount Publix Corp.*, 240 App. Div. 520, 270 N. Y. Supp. 544 (3d Dep't 1934) (motion pictures); *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N. Y. Supp. 829 (1st Dep't 1915) (motion pictures); *Tarpley v. Blabey*, 2 Bing N. C. 437 (1836) (signs). *E.g., supra* note 3.

5. *Lewis v. Hayes*, 177 Cal. 587, 171 Pac. 293 (1918); *Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (1812).

read from a manuscript by a speaker over the radio constitutes libel rather than slander.<sup>6</sup> Finally, the recent tendency of the courts to distinguish between libel and slander on the basis of the "extent of publication"<sup>7</sup> is still another reason for holding the tort of libel is committed, if plaintiff is defamed by television.

There would seem to be reason for adapting the rules concerning publication of libel by radio to the television field. When one writes libelous words concerning another and reads them before a microphone with the consent of the owner of the broadcasting station, the reader and owner unite in the publication of a libel and may be joined as defendants in an action for damages.<sup>8</sup> A newspaper publisher who prepared the article of defamation and paid for the radio time has also been held liable with the owner of the station and the announcer.<sup>9</sup> If this rule of liability is carried over to the television field, the station owner, the performers and the commercial sponsor of the production would all be liable for the television defamation.<sup>10</sup>

As a general rule the defendant in a libel action is held strictly responsible for innocent publication of libelous matter without proof that he (the defendant) intended the consequences or was negligent with respect to them.<sup>11</sup> The theory of strict liability for publication of libel by radio seems to have been modified by the more recent cases and by statutes in some states as far as the liability of the owner of the station is concerned. Where a radio broadcasting station uses due care in the selection of the person it permits to use its facilities and in the inspection of the script used by such person, it is not liable for extemporaneous defamatory remarks inserted by such person without the prior knowledge of the radio broadcasting station and without warning or indication that they are about to be inserted.<sup>12</sup>

Those who would tend away from imposing strict liability on the station owner in the cases of radio defamation argue that the station becomes liable only as an agency for dissemination and should be held only to a standard of due care comparable to that of a news dealer or a library. They point out that it is not unfair to hold a newspaper publisher strictly liable because of the opportunity to check

6. *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (D. C. Mo. 1934); *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932); *Contra: Locke v. Gibbons*, 164 Misc. 877, 299 N. Y. Supp. 188 (Sup. Ct. 1937) *aff'd*, 253 App. Div. 887, 2 N. Y. S. 2d 1015 (1st Dep't 1938); *Meldrum v. Australian Broadcasting Co.*, Vict. L. Rep. 425, 38 Argus L. Rep. 432 (1932).

7. PROSSER, TORTS 809 (1st ed. 1941).

8. *Sorensen v. Wood*, *supra* note 6.

9. *Miles v. Louis Wasmer, Inc.* 172 Wash. 466, 20 P. 2d 847 (1933).

10. *Cf. Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (D. C. Mo. 1934) (a Missouri broadcasting company which had broadcast network program originating in New York was held liable for defamatory words which it had no means of interrupting in time).

11. RESTATEMENT, TORTS § § 579, 580 (1938).

12. *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N. Y. S. 2d 985 (Sup. Ct. 1942); *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A. 2d 302 (1939) (sponsored broadcast).

the copy before printing and thus to eliminate libelous matter. In the case of a radio station, the opportunities for control are not equal. Even if a script is required to be submitted before a broadcast this does not prevent extemporaneous utterances of a defamatory nature.<sup>13</sup> Is not this argument equally applicable to television defamation?

Television programs being presented today fall into three categories: (1) the rehearsed performance where live actors perform before the TV camera and the performance is transmitted to audience screens; (2) prepared in advance films are transmitted to audience screens; (3) "on the spot" camera shots of news events, sports, *etc.* are directly transmitted. The participants in the latter category are generally unrehearsed and frequently do not know of the broadcast.<sup>14</sup>

In category one the TV station owner has the same opportunity to check the material to be presented as the radio station owner has to check a prepared script. The danger of extemporaneous defamatory pantomime exists just as in the case of extemporaneous remarks by performers of prepared radio scripts. A variation of category one is the use of "kinescope" film. Kinescope recordings are not to be confused with films made especially for television. Through the use of kinescope recordings, observers will see network video shown on a delayed basis. The kinescope recordings serve the same function as transcriptions of regular radio programs.<sup>15</sup>

In using kinescope recordings and the film in category two, the TV station owner has the same opportunity to discover and cut out defamatory material as newsreel exhibitors and radio broadcasters of transcribed material.

Category three presents the greatest danger for defamation (also for the invasion of privacy, *infra*). The station owner will have little control over what goes into the camera and even a highly skilled camera operator may not have opportunity to prevent defamation.<sup>16</sup>

It is significant that category three is the medium in which television is at its best for entertainment value and mass appeal and is the only entirely new field that has been activated by television. Category one (rehearsed performance and prepared scripts) has up to the present time, presented no more than mediocre plays. Presentation of films (category two) is in many ways no more satisfactory entertainment than ordinary newsreels or motion pictures. But the dream of witnessing "history in the making" is an actuality, by the employment of TV process in category three.

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13. Notes, 18 CORN L. Q. 124 (1932); 46 HARV. L. REV. 133 (1932); 18 IOWA L. REV. 98 (1932).

14. Kansas City Star, Sept. 11, 1949, § F, p. 16, cols. 4, 5.

15. Kansas City Star, Sept. 11, 1949, § F, p. 4, col. 1.

16. Kansas City Star, Sept. 11, 1949, § F, p. 8, col. 1. Small "monitor" screens show the television commentator what the camera is picking up and transmitting to the television audience. By the use of several cameras and several monitor screens a skilled operator may shift from one view to another, but control over what is transmitted is still slight.

If the readily applicable analogies of defamation by radio and motion picture are followed in TV cases the courts will arrive at the conclusion that the television station owner and network stations should be liable for negligence only, when the defamation occurs by extemporaneous interlopings by the actors in rehearsed programs (category one). With the opportunity to examine and cut the film used in the presentation of programs, under category two, and the kinescope recordings, a higher standard of care should be required. In any case the performers should be held responsible for libel. The liability of a commercial sponsor of television program can be said to be roughly analagous to that of the station owner, though there is much to be said for holding the sponsor strictly liable for the acts of the performers since the sponsor receives the direct benefit of the production. The possibility of liability innocently incurred, on the part of the station or the commercial sponsor, is rather remote, since a careful selection of talent and a careful examination of the script or film should prevent libelous matter from being televised.

Should the performers, commercial sponsor and station owner be held strictly liable for defamation occurring as the result of employment of the TV camera in production of programs under category three (unrehearsed on the spot shots of current happenings transmitted directly to the witnessing public)? It may well be argued that performers who do not know they are within the range of the TV camera are not liable for defamation, since mistaken publication is a well recognized common-law defense.<sup>17</sup> Where the performer knows of the publication he should be held strictly liable. It can be argued that since the station owner and the commercial sponsor have a very small amount of control over the performers, their liability should only be founded on negligence, as in the cases of extemporaneous interlopings in the prepared radio scripts<sup>18</sup> and in the transmission of network programs. Lending further weight to the argument of liability founded on negligence are two factors: (1) broadcasts in category three are of the highest entertainment value and vexing and expensive litigation may discourage sponsors and station owners from presenting this type of program; (2) the television industry is an infant industry, not at the present a large moneymaker,<sup>19</sup> which (industry) should be protected and encouraged until it becomes better able to bear the burdens. On the other hand, the possibilities of defamatory matter being published by television through the use of unrehearsed productions directly transmitted are very great. The station owner and commercial sponsor, on their own initiatives, engage in the business for profit and the extent of the publication will be large. The station owner and sponsor should be able to foresee that defamatory material is likely to be transmitted through the use of unrehearsed programs. Should the innocent victims of the defamation have to bear the loss?

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17. PROSSER, TORTS 818, 819 (1st ed. 1941).

18. *Summit Hotel Co. v. National Broadcasting Co.*, *supra* note 12.

19. Time, April 25, 1949, p. 95, col. 1, "The nation's Fifty TV Stations lost Fifteen Million Dollars in 1948." The Federal Communication Commission predicts one thousand TV stations within seven years. The commission also estimates that eighteen million receiving sets will be owned by 1953.

This question, of course, will not be resolved until the courts or legislatures have acted, but it appears that the trend today is toward strict liability. As pointed out by Dean Pound, "There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the loss, and hence to shift the loss by creating liability where there has been no default."<sup>20</sup>

#### INVASION OF PRIVACY

It is in the comparatively new field of tort of "invasion of privacy" that the network and program sponsor lawyers are most wary of potential liabilities.<sup>21</sup> The right of privacy is an independent legal right of an individual and its violation constitutes a tort.<sup>22</sup> The doctrine that there is a legally enforceable right of privacy has been definitely approved by court decision in fourteen states.<sup>23</sup> Two states by statute have created such a right.<sup>24</sup> A common law right to redress for invasion of privacy has been denied in two states.<sup>25</sup> One state seems in favor of recognizing the existence of the right to privacy but is not yet definitely committed.<sup>26</sup> Four states have expressed doubt as to the existence of the right, but have not at the present time definitely rejected a recovery on the privacy invasion theory.<sup>27</sup> The tort for invasion of privacy has been variously defined: "A person who unreasonably and

20. Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 233 (1914).

21. Yoder, *Be Good! Television's Watching*, The Saturday Evening Post, May 14, 1949, p. 29 (a layman-language article written in a humorous vein, which points out some of the problems in fixing tort liability in the television field).

22. *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

23. *Arizona*, *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945); *California*, *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); *District of Columbia*, *Peed v. Washington Times Co.*, 55 Wash. L. Rep. 182 (1927); *Florida*, *Cason v. Boskin*, 155 Fla. 198, 20 So. 2d 243 (1944); *Georgia*, *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Indiana*, *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E. 2d 755 (1946); *Kansas*, *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918); *Kentucky*, *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909); *Missouri*, *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *New Jersey*, *McGovern v. Van Riper*, 137 N. J. Eq. 24, 43 A. 2d 514 (1945), *aff'd*, 137 N. J. Eq. 548, 45 A. 2d 842 (1946); *North Carolina*, *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S.E. 55 (1938); *Ohio*, *Friedman v. Cincinnati Local Joint Executive Board*, 20 Ohio Ops. 473 (1941); *Oregon*, *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P. 2d 438 (1941); *Pennsylvania*, *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (1940); *South Carolina*, *Holloman v. Life Ins. Co. of Virginia*, 192 S. C. 454, 7 S.E. 2d 169 (1940).

24. *New York*, *Utah*.

25. *New York*, *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N.E. 442 (1902) (this decision led to passage of the statute in footnote 24, *supra*); *Rhode Island*, *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97 (1909).

26. *Louisiana*, *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905), *aff'd* on re-hearing 117 La. 708, 42 So. 228 (1906).

27. *Massachusetts*, *Wright v. R. K. O. Radio Pictures*, 55 F. Supp. 639 (D. C. Mass. 1944); *Michigan*, *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899); *Washington*, *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594 (1911); *Wisconsin*, *Judevine v. Benzie-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936).

seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other,"<sup>28</sup> a violation of the "right . . . to be free from unwarranted publicity,"<sup>29</sup> finally, as a violation of the "right to live without unwarranted interference by public in matters with which it [the public] is not necessarily concerned."<sup>30</sup>

While there has been some confusion between the torts of libel and slander and the tort of invasion of privacy, the torts can be distinguished on the ground that the right of privacy concerns one's own peace of mind while the right of freedom from defamation concerns primarily one's reputation.<sup>31</sup> The main worries of attorneys for the station owners and sponsors are, unlike libel and slander, that truth is no defense to an action for the invasion of the right of privacy;<sup>32</sup> the precise motives of the defendant are unimportant in ascertaining liability,<sup>33</sup> and the absence of malice is no defense.<sup>34</sup> In order to recover for an invasion of privacy it is not necessary to allege and prove special damages.<sup>35</sup>

Before examining the various possibilities for invasion of privacy in the television field, an enumeration of the various defenses available to the action is necessary. The right of privacy does not prohibit the publication of matter which is of legitimate public or general interest.<sup>36</sup> Publicity concerning a person who by his conduct, achievements or mode of life may be said to be a public figure<sup>37</sup> or the publication of a person's name or picture in connection with a news or historical event of public interest,<sup>38</sup> are all privileged publications.

In the use of prepared television scripts and previously prepared films (including kinescope recordings) in television transmission, the station owners, commercial sponsors and performers, will face liability closely analogous to that incurred by motion picture and newsreel producers. A motion picture depicting the early life of a reformed prostitute, using real names and incidents, has been held to be an invasion of privacy.<sup>39</sup> There is a limit to the extent that current events may be dramatized in newsreels without infringing upon the right of privacy.—The studio

28. RESTATEMENT, TORTS § 867 (1939).

29. *Holloman v. Life Ins. Co. of Virginia*, 192 S. C. 454, 7 S.E. 2d 169 (1940).

30. *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

31. See note, 138 A.L.R. 25 (1942).

32. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Warren and Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890).

33. *Sidis v. F-R Pub. Corp.*, 113 F. 2d 806 (C.C.A. 2d 1940), *cert. denied* 311 U. S. 711 (1940).

34. *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

35. *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911).

36. *Pavesich v. New England Mutual Life Ins. Co.*, *supra* note 35; *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W. 2d 972 (1929); *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E. 2d 753 (1940).

37. *Pavesich v. New England Mutual Life Ins. Co.*, *supra* note 35; *Smith v. Suratt*, 7 Alaska 416 (1926).

38. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Jones v. Herald Post Co.*, *supra* note 36.

39. *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).



reconstruction of a ship wreck using real names and incidents in the production, was held to be an invasion of privacy.<sup>40</sup> The high "measure of control" of station owners and commercial sponsors should determine their liability when prepared films or scripts are employed.

As in the case of defamation, it is in the use of the TV camera for "on the spot" coverage directly transmitted that the possibilities for invasion of privacy are greatest, and the measure of control by the station owner and sponsor the least.

Already TV broadcasts are being made from the football stadium, the boxing arena, the night club, restaurants and similar establishments of public service and amusement. Do people who frequent such public places give up their right of privacy and become "subjects of legitimate public interest" so that their faces can be transmitted to millions of onlookers throughout the country?

To make the problem clearer, a few hypothetical situations will be considered: first, the liability, if any, for transmission of an individual's picture from a world's series baseball game; second, the liability for portraying a customer in a night club; and, third, the portrayal of a customer in a retail store.

The first includes the right of an employee with a "deceased grandmother excuse" at a world's series game to be free from the gaze of a television-fadist employer. Either by accident or design, spectators at sporting events frequently appear on the television screen. Even if we grant that the event being televised is a legitimate subject for television broadcast, it does not necessarily follow that the spectators attending such events can be legally pictured. (Unlike newsreels or motion pictures there is little opportunity to cut the work before it is transmitted). There seems to be good reason for saying that by his attendance at the ball game, the employee waives his right not to be recognized and photographed. The gathering is of a *public nature* and there is the *usual established practices of photographing such crowds*. The spectators at sporting events can then be said to be subjects of legitimate public interest.

But in the case of television transmission from a night club the question is much closer. The unfortunate convention delegate who is picked up by the TV camera with a blond fellow-delegate and subsequently observed by the wife-he-left-at-home may have a cause of action. Patrons of night clubs generally expect, and receive, a large measure of privacy. Unlike fans at the ball game, those at ring side tables in the night clubs are not generally understood to be part of the entertainment and the possibilities of being recognized by an acquaintance in the "Diamond Horseshoe" is much smaller than in "Yankee Stadium" or "Sportsman's Park." Finally, it may not offend a person of "ordinary sensibilities" to be photographed at the ball park, where it could be said to offend such person if he is exposed to the public gaze in attendance at a night club. As a practical matter, night club owners and television people have cooperated to place small cards on tables

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40. *Binns v. Vitagraph Co. of America*, 210 N. Y. 51, 103 N.E. 1108 (1913) (produced sometime after the actual ship wreck).

warning patrons that they will soon be the subject to a telecast.<sup>41</sup> It is clear that the patron by consenting to the telecast, will waive his right to sue for an invasion of privacy.<sup>42</sup> It may be argued that in a jurisdiction such as New York, which by statute requires the invasion of privacy to be for commercial use, that there would be no liability in the cases where there is no commercial sponsor of the scene telecasted. There is little merit to this argument, however. Such unsponsored telecasts are programs designed to build up the witnessing audience of the station, and can hardly be said to be of a non-commercial nature.<sup>43</sup>

Apparently, a store owner who uses television to advertise his customers, without securing the customer's permission to become an actor in the production, will incur liability. The taking of moving pictures of a customer in a store and the exhibition of the pictures in a theatre in the neighborhood where the customer lived to advertise the business of the store, without consent of the customer, was held to constitute an invasion of the latter's right of privacy, entitling her to damages against the owner of the store.<sup>44</sup>

Due to the nature of television broadcasts it may be that the courts will distinguish between intentional or negligent invasions of privacy and accidental invasions. But because of the great likelihood of rights of innocent parties being violated by the accidental invasion of privacy, it may well be said that damages for invasion of privacy should fall on those who employ the medium by which the invasion was brought about.

#### MISCELLANEOUS

In addition to the torts discussed in the two preceding sections (libel and invasion of privacy), there are certain miscellaneous liabilities which may be imposed upon television station owners and commercial advertisers. While these will not be discussed in detail, mention should be made of them. In the group are the "statutory torts" for invasion of copyrights and unfair business competition, and the penal provision against the use of profane or obscene language over the air waves.

It has long been held that radio broadcasting of a copyrighted musical composition is within the protection of the statute giving the owner of the copyright the exclusive right to perform the copyrighted work publicly for profit.<sup>45</sup> There would not seem to be much doubt that the copyright laws also protect the owner from

41. Yoder, *Be Good! Television's Watching*, *supra* note 21.

42. *Marek v. Zanol Products Co.*, 298 Mass. 1, 9 N.E. 2d 393 (1937) (the consent to use of his picture and name for advertising purposes constituted a waiver of plaintiff's right of privacy to that extent).

43. *Cf. Associated Music Publishers v. Debs Memorial Radio Fund*, 141 F. 2d 852 (C.C.A. 2d 1944), *cert. denied* 323 U. S. 766 (1944) (copyright invasion statute defining a breach as a "commercial use" held to have been violated by use of copyrighted material for broadcast on unsponsored program by non-profit station).

44. *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918).

45. *Jerome H. Remick & Co. v. American Automobile Assessories Co.*, 5 F. 2d 411 (C.C.A. 6th 1925); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D.C. N.J. 1923).

unauthorized TV performance. Whether the owner of a bar where a television screen is installed for the benefit of his patrons, is liable for violation of the copyright regulation for telecasting programs without permission, is an open question. It has been held that the defendant did not "perform" the copyrighted works, within the meaning of the copyright act, where he owned and operated a hotel in which there was a master radio receiving set by means of which the hotel furnished musical entertainment to the guests in its public rooms and also in its private rooms by means of wires leading from the master sets.<sup>46</sup>

In the field of unfair competition, it has been held that the use of radio skits, alleged to be of inferior quality and carrying the title of a well known novel, but not based on the novel, amounted to unfair competition.<sup>47</sup> The same rules should be equally applicable to television productions.

Under its power to regulate interstate commerce, Congress provided in the Radio Act that no person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communication. This provision has been held valid.<sup>48</sup> Should not such a penalty be imposed upon a television station for transmitting a picture of an individual whose lips are forming obscene words, the meaning of which is quite apparent to those capable of reading lips?

#### CONCLUSION

By way of summary: The well formulated rules of defamation would seem to apply to television broadcasts where prepared scripts and films or recordings are used, due to the lack of control over the subject matter. Liability in the latter situation, therefore, if established, should be worked out through some concept of social justice or ability to pay the loss. An invasion of privacy will occur when the TV camera transmits a scene which is not a legitimate subject of public interest. It is suggested that perhaps a sports crowd is an object of public interest, while the patrons of a night club and the customers of a retail store, are not of public interest. Copyright and unfair competition laws may be breached by the medium of television. Profane language, received by lip reading audiences may also give trouble.

The whole field of television liability is just being opened up and there are many questions to be answered by the courts, the legislatures and lawyers before TV tort liability will be established. But the brilliant hues of color television (*supra*) will be dull indeed beside the red faces of lawyers who fail to recognize the new elements which must be taken into account in the coming flood of television litigation.

RICHARD G. POLAND

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46. *Buck v. Duncan*, 32 F. 2d 366 (D.C. Mo. 1929).

47. *Prouty v. National Broadcasting Co.*, 26 F. Supp. 265 (D.C. Mass. 1939).

48. *Duncan v. United States*, 48 F. 2d 128 (C.C.A. 9th 1931), *cert. denied* 283 U. S. 863 (1931).

RIGHT OF CHILDREN TO SUE FOR INTERFERENCE WITH THE FAMILY  
RELATION AND SUPPORT

The early common law adopted the ancient Roman doctrine of *Pater Familias*. The totality of family rights vested in the father and was expressed by him, and the identity of the family members was merged in him.<sup>1</sup>

"We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury."<sup>2</sup>

So for many years women were denied the right to recover for alienation of their spouses' affections<sup>3</sup> and the husband was permitted recovery only on the fiction of loss of services.<sup>4</sup> These limitations were subsequently removed, and both spouses were permitted to recover in criminal conversation<sup>5</sup> or alienation of affections,<sup>6</sup> for loss of consortium.<sup>7</sup>

It has been generally recognized that a child has an interest in his relation with his parents.<sup>8</sup> A child has, for example, an interest in the society, affection, and

1. Fisher, *Pater Familias—A Cooperative Enterprise*, 41 ILL. L. REV. 27 (1946).

2. 3 BLACKSTONE 143 (1765). Two additional reasons are—first, the common law procedural difficulty of suit by the feme covert or a child [see 3 VERNIER, *AMERICAN FAMILY LAWS* p. 255 (1935)], and secondly, the fact that an errant husband would be entitled to the proceeds of the recovery. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

3. *Duffies v. Duffies*, 76 Wis. 374, 45 N.W. 522 (1890), holding that no cause of action would lie at common law or under the statutes permitting married women to sue; MADDEN, *PERSONS AND DOMESTIC RELATIONS* p. 172 (1931).

4. "It is perhaps true that the theory of such an action was originally the loss of services, for it was presumed that by the seduction or alienation the wife's services were rendered less valuable." *Adams v. Main*, 3 Ind. App. 232, 29 N.E. 792, 5 Am. St. Rep. 266 (1892).

5. *Oppenheim v. Kridel*, 236 N. Y. 156, 140 N.E. 227 (1923).

6. *Bennett v. Bennett*, 116 N. Y. 584, 23 N.E. 17 (1889).

7. "... it is certain that the weight of modern authority bases the action on the loss of consortium,—that is, the society, companionship, conjugal affections, fellowship, and assistance. The suit is not regarded in the nature of an action by a master for the loss of services of his servant, and it is not necessary that there should be any pecuniary loss whatever." *Adams v. Main*, *supra* note 4; KEEZER, *MARRIAGE AND DIVORCE* § 50 (2d ed. 1923). "Any interference with these [marital] rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same." *Bennett v. Bennett*, 116 N. Y. 584, 23 N.E. 17, 18 (1889).

8. "The next, and the most universal relation in nature, is . . . that between parent and child." 1 BLACKSTONE, *COMMENTARIES* § 446 (1902).

moral support of the parent, and in support and maintenance.<sup>9</sup> The parent owes duties of protection,<sup>10</sup> guidance,<sup>11</sup> preservation,<sup>12</sup> and education.<sup>13</sup> A parent has an interest in the services of the child,<sup>14</sup> in the companionship and affection of the child, and in the chastity of the female child.

But the parent-child relationship differs from the common law husband-wife relationship in that there is no unity of legal personality of parent and child.<sup>15</sup> The law has never recognized the right of the parent to consortium of children as it has done in the relation of husband and wife.<sup>16</sup> Thus no action by a parent will lie against a third party for alienation of affections of the child.<sup>17</sup>

The parent's rights in the child have been protected, by suits against third persons, in actions based upon the fiction of loss of services and loss of opportunity to enjoy the child's earnings.<sup>18</sup> The child on the other hand could neither sue the parent nor third persons directly at common law. Thus, while the responsibility of the parent for support of the child has long been recognized,<sup>19</sup> even to the extent of imposition of criminal penalties,<sup>20</sup> the child has been unable to enforce this duty.<sup>21</sup> Attempted justifications for this refusal to allow the child to sue have been on the grounds that the parents owe a moral, not a legal duty of support and that such suits would destroy the unity of the home.<sup>22</sup> But today the majority of jurisdictions regard the duty to support as a legal duty.<sup>23</sup> And a California statute, requiring a person to support a child or parent who is unable to support himself<sup>24</sup> has been interpreted to allow the neglected party to enforce the duty of support by a bill in equity.<sup>25</sup>

9. 1 SCHOULER, DOMESTIC RELATIONS § 773 (6th ed. 1921).

10. *Weir v. Marley*, 99 Mo. 484, 12 S.W. 798 (1890).

11. *Monen v. Monen*, 64 S.D. 581, 269 N.W. 85 (1936).

12. *People v. Pierson*, 176 N. Y. 201, 68 N.E. 243 (1903).

13. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

14. MADDEN, PERSONS AND DOMESTIC RELATIONS § 120 (1931).

15. *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930).

16. 1 STREET, THE FOUNDATION OF LEGAL LIABILITY p. 267 (1906).

17. *Pyle v. Waechter*, 202 Iowa 695, 210 N.W. 926 (1926); *Miles v. Cuthbert*, 122 N. Y. Supp. 703 (Sup. Ct. 1909).

18. *Pickle v. Page*, 252 N. Y. 474, 169 N.E. 650, 72 A.L.R. 842 (1930); RESTATEMENT, TORTS § 703, Comments g, h (1938); *Grinnell v. Wells*, 7 Man. & G. 1033, 135 Eng. Rep. 419 (C. P. 1844).

19. 1 BLACKSTONE, COMMENTARIES § 447; 2 KENT, COMMENTARIES § 189 (1884).

20. Stat. 43 Eliz., c. 2 (1706); Stat. 5 Geo. I, c. 8 (1718); ILL. REV. STAT. c. 38, § § 100-101 (1945).

21. *Huke v. Huke*, 44 Mo. App. 308 (1891); *Rawlings v. Rawlings*, 121 Miss. 140, 83 So. 146 (1919); *contra*: *Green v. Green*, 210 N. C. 147, 185 S.E. 651 (1936), noted 15 N. C. L. REV. 67 (1936).

22. *Rawlings v. Rawlings*, 121 Miss. 140, 83 So. 146 (1919); *Buchanan v. Buchanan*, 170 Va. 458, 197 S.E. 426 (1938).

23. PECK, DOMESTIC RELATIONS § 126 (3d ed. 1930).

24. CAL. CIV. CODE § 206 (Deering, 1941).

25. *Paxton v. Paxton*, 150 Cal. 667, 89 Pac. 1083 (1907); see 4 VERNIER, AMERICAN FAMILY LAW, Table cxii, p. 66 (1936) for a compilation of state law as to the duty of support by the parent.

Recently the legislatures have recognized the right of a child to recover against a third person interfering with the family relation, causing loss of support to the child. Statutes allow a child to recover against third persons selling intoxicating liquor to the father if causing injury to the child's right to support,<sup>26</sup> and Wrongful Death Acts allow a child to sue for the parent's death due to the tort of a third person.<sup>27</sup>

But the courts have, until recently, uniformly denied the right of a child to recover for the alienation of its parent's affections. Thus in *Coulter v. Coulter*<sup>28</sup> the court held that a cause of action for alienation of affections can arise only out of the marriage relation, the basis of the action being the loss of consortium.<sup>29</sup>

In *Cole v. Cole*,<sup>30</sup> where a brother sued his sister for the alienation of the affections of their mother resulting in interference with his access to the home, an order sustaining a demurrer to the petition was affirmed.

In *Morrow v. Yannantuono*,<sup>31</sup> plaintiff alleged that while he was an infant living with his parents, the defendant enticed his mother from her home, depriving him of the affection, love and comfort of his mother, damaging his reputation. The court held that plaintiff failed to state a cause of action, basing its decision upon (1) absence of loss of consortium, (2) fear of flood of litigation and (3) adequate protection of the children by an action by the husband.

However, in the celebrated case of *Daily v. Parker*,<sup>32</sup> the court first recognized the right of a child to sue third persons for alienation of affections of a parent. In that case, four minor children sued by their mother as next friend, alleging the defendant enticed their father from their home, causing him to live with her, resulting in the refusal of the father to continue the maintenance and support of the plaintiffs. The circuit court of appeals reversed the District Court of Illinois, and held that the complaint stated a cause of action, and the plaintiffs recovered.

And in *Johnson v. Luhman*,<sup>33</sup> five minor children sued for damages, alleging that defendant induced their father to desert them and breach his duties to his family. The upper court reversed the trial court's action in sustaining the defendant's motion to dismiss for failure to state a cause of action, and held that the children are entitled to sue for damages against one who has destroyed their family relationship.

But subsequent cases indicate a reluctance of other courts to follow the doctrine of *Daily v. Parker*. In *Taylor v. Keefe*,<sup>34</sup> a minor son sued the defendant for the alienation of his mother's affections. The Supreme Court of Connecticut

26. ILL. STAT. ANN. § 68.042 (Jones, 1935); PA. STAT. ANN. Tit. 43 § 641 (Purdon, 1941).

27. PA. STAT. ANN. Tit. 12, § 1602 (Purdon, 1931).

28. 73 Colo. 144, 214 Pac. 400 (1923).

29. But note that this was an action by an adult, not a child.

30. 277 Mass. 50, 177 N.E. 810 (1931).

31. 152 Misc. 134, 273 N. Y. Supp. 912 (1934).

32. 152 F. 2d 174, 162 A.L.R. 819, 824 (C.C.A. 7th 1945).

33. 330 Ill. App. 598, 71 N.E. 2d 810 (1947).

34. 134 Conn. 156, 56 A. 2d 768 (1947).

affirmed the trial court's action in sustaining the defendant's demurrer to the complaint on the grounds of failure to state a cause of action. The court rejected the doctrine of the *Parker* and *Johnson* cases, and reasserted doctrine of the *Morrow* case, finding in the practical difficulties there expounded "persuasive reason why as a matter of policy this court should not recognize the validity of the cause of action claimed." The court decided that the fact that in only three prior cases had such a claim for relief been urged upon the courts "indicates the absence of any need for such relief sufficiently general to induce the bar to press for its recognition by the courts." It also concluded that the enactment of anti-Heart Balm statutes in twelve states "suggests wide-spread appreciation of the fact that the social advantages of granting the right claimed would be out-weighed by the disadvantages."

In *Rudley v. Tobias*,<sup>35</sup> a minor plaintiff sued defendant for the alienation of his father's affections, depriving plaintiff of the "presence, comfort, society, guidance, affection and paternal care of his father and of the fruits and benefits of the integral family." The court held that the 1939 amendment of the California Civil Code, Sec. 49, resulting in the elimination of a provision forbidding "the abduction . . . of a parent from his child," together with the enactment of Sec. 43.5 of the Civil Code providing that "No cause of action arises for alienation of affection," outlawed the right of a child to sue another for the alienation of affections of the parent. The court stated the principle that "amendment of a statute . . . operates as a repeal of those parts of the statute . . . which are not re-enacted," and concluded that "in view of the evident legislative intent, . . . neither public policy nor any other concept can here justify a creation of personal rights by so-called 'judicial process'."

In *Garza v. Garza*,<sup>36</sup> four children sued defendant for the alienation of affections of their father causing him to leave them, divorce their mother, and marry defendant. The lower court allowed recovery for "injuries which arise from their right to support and maintenance from their parent" and "for injuries to feelings and damages which arise from their right to the comfort, protection and the society of their father." The upper court reversed the lower court decision, denied recovery, following the reasoning of the *Morrow* case, and refusing to exercise "judicial empiricism." The court also found the evidence insufficient to support a finding that defendant actually enticed the father to abandon his children.

However, in two very recent cases, of first impression, the doctrine of *Daily v. Parker* has been strongly reasserted. In *Miller v. Monsen*,<sup>37</sup> plaintiff, a six year old child, sued defendant for enticing plaintiff's mother from their home and family, and for the resulting destruction of the relationship between plaintiff and her mother. The Minnesota court decided that "A child has a right of action against one enticing its parent from their family home to recover damages sustained as a result

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35. 190 P. 2d 984 (Cal. 1948).

36. 209 S.W. 2d 1012 (Tex. 1948).

37. 37 N.W. 2d 543 (Minn. 1949).

of the enticement" and stated that "benefits of the greatest value flow to the child from its mother's love, society, care, and service, which may be a major factor in the welfare of the child during its entire life," and "Enticement of a mother is a grievous, outrageous, and tragic wrong to her child."

And in *Russick v. Hicks*,<sup>38</sup> on an almost identical set of facts, the district court in Michigan recognized the "... hypothesis of a mutually united and cooperative relationship between the mother, father, and children, which existed until destroyed by the defendant's malicious intrusion," and granted recovery to the infant child.

The *Parker* case invoked a storm of comment,<sup>39</sup> much of which is highly critical. It has been argued that to allow a child to recover for the alienation of his parent's affections would open our courts to a "flood of litigation."<sup>40</sup> This position is obviously unsound. If a court is to recognize a wrong, it must give a remedy equally to all who are wronged, and the greater the number of wronged parties, the greater the need to provide a remedy. It is the court's responsibility to choose the good suits from the bad, to decide each suit individually on its merits. Furthermore, in the fifteen years since the *Morrow* decision, there have been found only six reported decisions in which a child has sought to assert such a right. It seems that the anticipated "flood" has developed into a mere dribble.<sup>41</sup>

Another of the "practical difficulties" due to which recovery has been denied is the possibility of multiplicity of suits.<sup>42</sup> It is feared that each child, as well as the innocent spouse could separately sue creating an undue hardship upon the wrongdoer. It is certainly true that each minor child of the wrongdoing parent as well as the injured spouse will have a separate cause of action due to their individual interests in the preservation of the family relation. But the existence of greater number of aggrieved persons should be a more compelling reason for recognizing this cause of action than for denying it completely.<sup>43</sup>

The *Morrow* case further suggests that the children are fully protected by the cause of action of the innocent spouse. "The husband has a cause of action. The ages and number of his children are elements to be considered in his action."<sup>44</sup> It is true that an injured spouse, suing for alienation of affections can offer evidence as to her support of the children<sup>45</sup> and can recover from the father money spent in support of the children.<sup>46</sup> But the action for alienation of affections includes, in addition to the element of financial support, the element of loss of society, companionship, love and affection.<sup>47</sup> And the *Parker* and *Johnson* cases allowed recovery for both "injuries which arise from their [the children's] right to support and main-

38. 85 F. Supp. 281 (W.D. Mich. 1949).

39. 7 INDEX TO LEGAL PERIODICALS 666 (1943-46).

40. *Miller v. Monsen*, *supra* n. 37 at 546.

41. *Morrow v. Yannantuono*, *supra* n. 31 at 914.

42. *Taylor v. Keefe*, *supra* n. 34 at 770.

43. Note 20 CORN. L. Q. 255 (1935).

44. *Morrow v. Yannantuono*, *supra* n. 31 at 914.

45. *Taylor v. Wilcox*, 188 Ill. App. 18 (1914).

46. *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623 (1887).

47. MADDEN, PERSONS AND DOMESTIC RELATIONS p. 166, 167 (1931).



tenance from their parent" and "injuries to [the children's] feelings and damages which will arise from their rights to the comfort, the protection and the society of the father."<sup>48</sup> The latter is not an element for which the spouse recovers in her suit. Moreover a child who has been injured by the tort of another should not be denied the right to recover until, if ever, his parents decide to sue.

One of the bases for the decision of the *Morrow* case is the lack of consortium between parent and child. "The loss of consortium is the very crux of the action [of alienation of affections]."<sup>49</sup> But it would be more logical to expand the concept of consortium to include all members of the family, rather than limit it to husband and wife. The family should be considered as a unit, all members having an interest in the preservation of the unit, and having a cause of action against one who interferes with or destroys that unit.<sup>50</sup> Furthermore, the fiction of loss of services has been abandoned, and consortium is now taken to include the elements of love and affection, society and companionship. Certainly, the children have as much right to these as the innocent spouse.

One writer states that to give a child this cause of action would result in extortionary litigation and fraudulent claims<sup>51</sup> similar to those which led to the campaign for the prohibition of suits for breach of promise and alienation of affections in 1935. It is doubtful whether prohibition in that class of cases was a wise solution for a difficult problem.<sup>52</sup> But in any event, it is the duty of the courts to distinguish the just from the unjust causes of action, to give each person his day in court. In every type of action there is the possibility of fraud and bad faith, but this alone is certainly insufficient reason to deny the right to sue to all. Actually, when a parent deserts his family to live with another, there is little possibility of fraudulent claims.

Other reasons for denial of this cause of action are the inability to define the point at which the child's right would cease, and the difficulty of measuring the amount of damages. But the fact that some members of a class are not sufficiently injured to be allowed recovery is certainly not a valid ground to deny the cause of action to all members of the class. And, certainly, damages cannot be any more difficult to determine when the child sues, than when the spouse sues for alienation of affections.

The *Parker* decision has been criticized on the ground that it is creating a new type of "heart-balm" suit which would allow plaintiffs to defeat the anti-"heart balm" statutes by substituting children for the injured spouse, since the action for alienation of affections of a *father, not a husband*, is *not* expressly covered by the majority of statutes.<sup>53</sup> It is highly questionable whether the policies prompting the

48. *Daily v. Parker*, *supra* n. 32 at 175.

49. *Morrow v. Yannantuono*, *supra* n. 31 at 913.

50. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lipman, *The Breakdown of Consortium*, 30 COL. L. REV. 651 (1930).

51. Note, 83 U. of PA. L. REV. 276 (1934).

52. Legis., 5 BROOKLYN L. REV. 196 (1936); Legis., 22 VA. L. REV. 205 (1935).

53. 46 COL. L. REV. 464 (1946); 94 U. of PA. L. REV. 437 (1946); Feinsinger, *Legislative Attack on "Heart Balm"*, 33 MICH. L. REV. 979 (1935)

abolition of such suits by the spouse have any application to suits by minor children.<sup>54</sup> But even if we assume that the reasons for the prohibition of these suits should equally apply to minor children,<sup>55</sup> it is suggested that there is little possibility of evasion of the anti-"heart balm" statutes by substitution of children for parents as parties plaintiff.<sup>56</sup> The recent case of *Rudley v. Tobias*<sup>57</sup> involved a California statute abolishing suits for "Alienation of Affections" not expressly applying to suits brought by children. The court found "evident legislative intent" to prohibit suits by children as well as spouses.<sup>58</sup> And in *Russick v. Hicks*,<sup>59</sup> the Michigan court expressly decided that the Michigan statute abolishing civil causes of action for alienation of affections applied only to such suits by injured spouses, and did not bar action by minor children since such right of action in children was neither known nor recognized under Michigan law when the statute was enacted.

Perhaps the chief source of dispute is that involving the doctrine of "judicial empiricism" as expounded by Dean Pound. "Anglo-American law is fortunate indeed in entering upon a new period of growth with a well-established doctrine of law-making by judicial decision. . . . Undoubtedly. . . . judicial empiricism was proceeding over-cautiously at the end of the last century. . . . If the last century insisted overmuch upon predetermined premises, and a fixed technique, it did not lose to our law the method of applying the judicial experiences of the past to the judicial questions of the present."<sup>60</sup>

The *Parker* and *Johnson* cases applied this doctrine, while the *Garza* and *Tobias* cases rejected it as an unwarranted assertion of legislative power by the court.

Certainly "judicial empiricism" is not a radical doctrine. It seems to be little more than a recognition of the principle that the common law and the legislature are not mutually exclusive. One supplements the other, they work hand in hand towards the common goal of justice. And if there is a wrong for which a remedy should be provided, it makes little difference whether it is provided by the courts or the legislature.

It is perhaps true, as is suggested by the *Morrow* case, that to allow recovery in this type of case would be of little value as a deterrent. But the court is probably confusing the purpose of civil actions with that of criminal actions. The

54. 1 VERNIER, AMERICAN FAMILY LAW § 6 (1931).

55. Kane, *Heart Balm and Public Policy*, 5 FORD. L. REV. 63 (1936).

56. Note that prior to the *Parker* and *Johnson* cases the Illinois court had held the Illinois anti-"heart balm" statute unconstitutional in *Daily v. Parker*, 61 F. Supp. 701 (D. C. Ill. 1945); *Heck v. Schupp*, 394 Ill. 296, 68 N.E. 2d 464 (1946).

57. 190 P. 2d 984 (Cal. 1948).

58. But note that this intent was at least reinforced by, if not partly due, to an earlier statutory amendment repealing a provision expressly stating that "The rights of personal relations forbid: 1. The abduction of . . . a parent from his child."

59. *Supra* n. 38.

60. POUND, SPIRIT OF THE COMMON LAW 183 (1921).

purpose of civil actions is not to punish a wrongdoer, not to deter future wrongdoing, but to compensate the injured party.

The arguments in favor of recognizing this cause of action are fewer, but perhaps sounder. The major basis for recognition is the extension of the principles of *Lumley v. Gye*<sup>61</sup> and *Wilkinson v. Downton*.<sup>62</sup> The former held that a third person is liable to the promisee for inducing the promisor to breach an employment contract. The latter held that unjustifiable willful conduct which results in harm to the plaintiff is actionable. The duties a father owes to his children by virtue of the family relationship are certainly analogous to, and no less important than, the duties owed to an employer by an employee by virtue of an employment contract. The only difference is that in the former case the defendant induces the breach of a duty founded in status rather than contractual relationship, but this alone cannot make the analogy inappropriate.

Actually the decision of the *Parker* case merely recognizes what sociologists have established many years ago, that the family is an entity, a unit entitled to protection from outsiders. Today, the father is merely a member of the unit, not its head, and owes duties to other members of the unit just as they owe duties to him. The alienation of a parent's affection is an interference with, and a destruction of, the family unit, and is a tort against each and every member of the family. If a spouse is given a cause of action, there is no logical basis for denying an equal cause of action to a child. Certainly, a growing child is injured infinitely more by the loss of a parent than the innocent spouse. And while the injured spouse has an opportunity to select a new mate less inclined to transgression, the child has none, but is instead denied the comfort, guidance and love of a parent. It is submitted that the *Parker* case is one of those rare and admirable instances in judicial history, in which a court will depart from outmoded precedent and render a decision in harmony with contemporary principles of social organization.

HARRY LEWIS CHOLKOFKY

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INSURABLE INTEREST—NECESSITY THAT BENEFICIARY  
OF STIPULATED PREMIUM PLAN LIFE INSURANCE POLICY  
HAVE INSURABLE INTEREST UNDER THE MISSOURI STATUTES

It is clear that in Missouri as in all other Anglo-American jurisdictions a beneficiary<sup>1</sup> who is the moving party in procuring the issuance of a life insurance policy

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61. 118 Eng. Rep. 749, 2 E. & B. 216 (1853).

62. 2 Q.B. 57 (1897); *Johnson v. Luhman*, *supra* n. 33 at 812.

1. For purposes of clarification the following definitions will be used throughout this article:

- a) Insurer—the corporation or association which contracts to pay benefits upon the death of a named person.
- b) Insured—the person who contracts with the insurer.
- c) *cestui que vie*—the person whose life is insured.
- d) Beneficiary—the person to whom the benefits of the policy accrue upon the death of the *cestui que vie*.

must have an insurable interest<sup>2</sup> in the life insured.<sup>3</sup> This rule finds its basis in the public policy of all jurisdictions prohibiting wagering contracts, at least where the subject of the wager is the life of a human being. There is also another reason given for such requirement, that it is not desirable to offer an inducement to one person to take another's life, which, it is thought, would be the result of allowing a person not having an insurable interest in the life insured to contract with an insurance company on the life insured. This is not given much weight by the courts any more because there is no such rule of public policy preventing the creation of a remainder following a life estate in real property, and the remainderman would have just as much inducement to crime as would the beneficiary of an insurance policy.

As a general rule, in the absence of statute, a person may contract for insurance on his own life, and may name whomsoever he desires as the beneficiary of the proceeds. That is to say, if the *cestui que vie* insures his own life, the beneficiary generally need not have an insurable interest in that life. This rule is the result of the property concept which permits the free and unrestrained alienation of one's own property, it being reasoned that the money used to pay the premiums on the insurance is the property of the *cestui que vie* and consequently he can control the disposition of what that money buys. In this case, it buys him the proceeds of a life insurance policy which he will not be able to receive in person. Since he must necessarily make some disposition of it, it should follow that he can give it to anyone, just as he can give any other personal property, without objection from anyone other than his creditors. Permitting such a disposition would not violate public policy. Every man has an unlimited insurable interest in his own life and therefore a policy procured by him on his own life would not be a wagering contract. It would seem reasonable to say that the *cestui que vie* would not name anyone as beneficiary who was not sufficiently interested in the continuance of the *cestui's* life to answer the argument that to name a beneficiary without an insurable interest is to offer an inducement to him to take the life of the *cestui que vie*.

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2. In *Warnock v. Davis*, 104 U.S. 775, 779 (1881) the court said:  
 "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as a creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."
  3. *Singleton v. St. Louis Mutual Ins. Co.*, 66 Mo. 63 (1877).

The general rules in the absence of statutory provisions have been pointed out. These rules are applied in the majority of jurisdictions. In Missouri, however, we have statutes governing the issuance of three of the most common types of life insurance. Section 6110, Revised Statutes of Missouri, 1939, permits fraternal benefit societies to limit by their constitutions or by-laws the classes of persons who may be beneficiaries of benefit certificates but does not impose any other restrictions.<sup>4</sup> Decisions construing these policies will not be discussed even though some of them have been cited as authority by the courts.

The applicable provision of the statute controlling assessment-plan policies is as follows:

"No corporation doing business under this article shall issue a certificate or policy . . . upon any life in which the beneficiary named has no insurable interest. . . ."<sup>5</sup>

The statute governing the issuance of insurance policies on the stipulated premiums plan provides:

"No corporation, company or association transacting business under the provisions of this article shall issue a certificate or policy to any person . . . unless the beneficiary named in the certificate or policy is the husband, wife, legal representative, relative, heir, creditor or legatee of the insured, or who may have an insurable interest in the insured"<sup>6</sup> (Note that the term "insured" is used in the statute to mean the *cestui que vie*.)

As the reader can see, a wider latitude in the selection of beneficiaries is permitted in the stipulated premium plan policy, though as to the specific problem of this note, *i.e.* a beneficiary who is in no way related to the insured, the language of the two statutes is the same. A befriended child, which is not legally adopted, is not within the designated beneficiaries. Nor is a paramour. Neither of these two classes of individuals is covered by the express provisions of the statute. So, in a policy where a person answering this description, or any other person similarly situated, is named as the beneficiary, the question will arise whether such a person has an "insurable interest" in the life of the insured.

It is to be noted that the prohibition runs to the issuance of such a policy by the insurer. Therefore the statutes would not have any application to the assignment of a policy of either type to a person without insurable interest in the insured life, but is there any reason why a different rule should apply to assignments? It seems not, and yet in turning to the cases in which the question of insurable interest has arisen, it will be seen that a different rule does apply.

## I

As a general rule all contracts are assignable so as to permit the assignee to recover the benefits of the contract from the obligor. This is simply the law of property which permits the free alienation of all types of personal property, the

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4. "Every society may, by its constitution, by-laws, rules, or regulations, limit the scope of beneficiaries."

5. MO. REV. STAT. Sec. 5862 (1939).

6. MO. REV. STAT. Sec. 5882 (1939).

benefits to be realized under a contractual arrangement being considered as personal property. However, in relation to life insurance contracts, there appears to be some question as to whether such a transfer to a person without an insurable interest in the insured life is valid. The prevailing view is that such an assignment, of either type of policy heretofore mentioned, at least when made by the *cestui que vie* in good faith and without any intention that the assignment be used as cover for a mere wager or gambling transaction, is valid.<sup>7</sup> The contrary view, subscribed to by some seven jurisdictions, said to include Missouri,<sup>8</sup> seems to have lost much weight in recent years. This view is that the assignment of a life policy by the *cestui que vie* to one having no insurable interest in his life is repugnant to public policy, apparently even where there is no bad faith. Now let us see actually what the rule is in Missouri.

The earliest case appearing in the books in which the question was involved is *McFarland v. Creath*<sup>9</sup> decided by the St. Louis Court of Appeals in 1889. The policy on which claim was made was one issued by a mutual benefit society. The policy was assigned to the defendant, a person without an insurable interest in the insured life, after having been carried for sometime by the *cestui que vie* who was also the insured. The defendant then paid the assessments on the policy until the death of the *cestui que vie*. The constitution of the company which issued the policy forbade assignments of policies without the consent of the secretary, and that was obtained by the insured and the assignee. The plaintiff, administrator of the estate of the *cestui que vie*, sought to recover the proceeds of the policy on the ground, *inter alia*, that the assignment to the defendant was void, the defendant having no insurable interest in the life of the *cestui que vie*.

In allowing the recovery by the defendant of the proceeds of the policy, Mr. Justice Biggs drew a distinction between the case where the *cestui que vie* takes out the policy, and where the beneficiary takes out the policy, saying in the first instance that the policy was clearly valid, and that there were no restrictions on the assignment of such a policy;<sup>10</sup> but that in the latter instance the contract was a wager, and void as against public policy. The decision in this case seems to be in accord with the general rule set out above. Two years later the same court had a similar question before it and, in denying a recovery by an assignee who

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7. 73 A.L.R. 1036 (1934), citing cases from 27 jurisdictions in the United States.

8. *Ibid.*, listing Alabama, Kansas, Kentucky, Pennsylvania, Texas, Virginia and Missouri.

9. 35 Mo. App. 112 (1889).

10. *Id.* at 122,

"But in the case at bar, the insurance was taken out by Morlson (deceased) himself, and carried for some time for his own benefit, and in which Creath took no part, and had no interest. Morlson had the undoubted right to take out the policy in the first instance, and although Creath may have had no insurable interest in Morlson's life, yet the transfer of the certificate cannot be regarded as void, unless it was shown that the arrangement between Morlson and Creath was in point of fact a wagering contract."

had paid value, said that such an assignment was void since it violated the rule against wagering contracts.<sup>11</sup> The earlier decision in the *McFarland* case<sup>12</sup> was noted, and distinguished on the apparent ground that what had earlier been held was that the *cestui que vie* may, if he sees fit, keep up the policy on his own life for the benefit of a third person, who may have no insurable interest therein; while in the principal case the policy was fully paid up, and worth \$1500 at maturity, for which the plaintiff had paid only \$342, which peculiar facts showed that the plaintiff was merely gambling on the life of the *cestui que vie* and therefore the transaction was void. It is rather difficult to see this distinction. In the one case the *cestui que vie* makes a gift of the policy, while in the other case the *cestui que vie*, being in immediate need of money, and having paid all the premiums on a life insurance policy seeks to enjoy some of the benefits of his money while he is still living. Is there any law which prohibits a man owning a negotiable promissory note due and payable at his death from negotiating the instrument to one who will pay him value for it? Is this any more a gamble than permitting a remainderman to convey his interest in a piece of realty for value during his lifetime? To ask such questions is to answer them in the negative. Still the St. Louis Court of Appeals laid down the rule that the assignment of a paid-up insurance policy for value is a wager, and as such is void beyond the amount actually paid for the policy.

This rule seems to have been modified in the next year by the St. Louis court<sup>13</sup> when it held that one paying value for an assignment of an insurance policy which was procured by the *cestui que vie* and payable to his wife as beneficiary could recover on the policy, but intimated that he could only recover the amount paid for the assignment, which, under the facts, amounted to the whole proceeds of the policy. The court noted the general rule where the beneficiary himself procures the policy and also the other rule where the *cestui que vie* procures the policy, but implied that even in this latter situation, the assignment must be in good faith, and not a mere disguise for a wagering contract.

Then, in *Mutual Life Ins. Co. v. Richards*,<sup>14</sup> the St. Louis court once again refused to recognize the good faith of the parties, and held that the only interest the assignee had in the policy was to the extent of the advances to the insured to pay premiums on the policy.<sup>15</sup> Here the assignee had advanced the money to pay the premiums admittedly in good faith wanting to help the *cestui que vie*,

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11. *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336 (1891). Here the policy had been assigned many times and the suit was between the assignee holding at the death of the *cestui que vie*, and his administrator.

12. *Supra* note 9.

13. *New York Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27 (1894).

14. 99 Mo. App. 88, 72 S.W. 487 (1903).

15. *Id.* at 489.

"... according to the rule in this state the interest acquired by Reynolds on account of advancements to pay premiums constituted all his interest in the insurance. Further than that the assignments were obnoxious to public policy, as being a speculation or wager on the life of the insured."

and the assignment was to be for security purposes only, but was absolute on its face. This case seemingly goes along with the general rule in Missouri in respect to an assignment to creditors, in allowing only a recovery of the amount of the debt.<sup>16</sup> This rule as to the right of the recovery of creditors seems a little hard to maintain in view of the express provision of the statute governing the issuance of policies under the stipulated premium plan of insurance which permits the naming of a creditor as beneficiary, and does not limit his recovery to the amount of the debt owed by the insured. The questionability of the rule was recognized by the St. Louis court in *Deal v. Hainley*.<sup>17</sup>

Seven years later the Kansas City Court of Appeals seemed to return to the early case of *McFarland v. Creath*,<sup>18</sup> in allowing a recovery by an assignee on a policy of insurance which was procured by the *cestui que vie*.<sup>19</sup> The premiums on the policy had been paid by the *cestui que vie* for three years, and then the policy was allowed to lapse, with a paid up value of \$750. One Trigg, the defendant in the interplea, paid value for the policy and it was assigned to him by the plaintiff, who was the *cestui que vie*. The plaintiff sought to recover the paid up value himself, and objected to the recovery of the defendant, Trigg, on the ground that Trigg did not have an insurable interest in the life of the plaintiff, and that therefore the assignment of the policy was void.

The court recognized the general rule where the policy is secured by the beneficiary who does not have an insurable interest to be that the policy was void.

"But that rule, and the reason for it, do not find application to insurance taken out by the assured himself for the benefit of one not having an insurable interest in his life. While in the instance of strangers insuring the life of another, it would be setting a price on that other's head, and thereby make it to the interest of the stranger that he should die, yet where the assured takes the policy the case is different

"Every reason exists for applying the distinction, or exception to the general rule, to instances where the assignment of the policy is made by the assured to one not having an insurable interest in his life."<sup>20</sup>

It would, seem therefore, that the annotation in the American Law Reports<sup>21</sup> is in error when it states that Missouri follows the minority even in the absence of

16. See, *Insurance-Insurable Interest—Creditor's Interest in Debtor*, 9 Mo. L. REV. 378-384 (1944) for a comprehensive discussion of the rights of creditors in insurance policies.

17. 135 Mo. App. 507, 116 S.W. 1 (1909),

"If a person is willing to take the risk of placing insurance on his own life for a beneficiary who has no interest in its preservation, he may do so . . . but because, though the law permits a contract of insurance to be made by a person on his own life for the benefit of another who has no pecuniary interest in his life, yet, by a distinction hard to maintain on principle, many courts, including those of this state, hold the assignment of a policy to one having no interest in the life of the insured is invalid, and, if made to a creditor, valid to the amount of his advances."

18. *Supra* note 9.

19. *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S.W. 1195 (1916).

20. *Id.* at 1196.

21. *Supra* note 7.



bad faith. The *Lee* case<sup>22</sup> has been followed and cited with approval in succeeding decisions<sup>23</sup> and seems to have settled the rule where the insurance is procured by the *cestui que vie* and then assigned to one not having an insurable interest in his life. There is, however, still some question as to the amount of the recovery allowed.<sup>24</sup>

## II

Now let us turn to the situation where the beneficiary who has no insurable interest in the life of the *cestui que vie* is named as the beneficiary in the insurance policy itself. It has been noted that where the *cestui que vie* is the insured, the general rule is that he may name whomsoever he desires as beneficiary of the policy where there is no statutory prohibition of his doing so. In Missouri we are faced with two statutes, the language of which purports to restrict the naming of beneficiaries in insurance policies of specified types.<sup>25</sup> As in any case of statutory interpretation the language of the statute must be looked at to determine whether one taking out a policy on his own life may designate as beneficiary one not having an insurable interest therein. Let us first look at the language regarding the issuance of policies on the assessment plan.

"No corporation doing business under this article shall issue a certificate or policy . . . upon any life in which the beneficiary named has no insurable interest . . ."<sup>26</sup>

This statute is directed to the insurance company which does business under the assessment plan. It contains no language making the policy, if such is issued, void. It provides no penalties for its violation. It could, therefore, have been interpreted as merely a prohibition on corporate action, enforceable by *quo warranto* proceedings but not affecting the validity of the policies. The courts have given the statute a broader interpretation.

The leading case is *Abernathy v. Springfield Mutual Ass'n.*<sup>27</sup> In this case the plaintiff, Etta Abernathy, was named the beneficiary in a life policy issued to her brother. The defendant was a mutual insurance company doing business on the assessment plan. The application for the insurance policy stated the relationship of the *cestui que vie* and the beneficiary, and was signed, "Adolph Randolph, Applicant, by Etta Abernathy." The insurance company defended on the ground that the plaintiff had no insurable interest in the life of her brother, and that there was an express statutory prohibition against the issuance of a policy where the beneficiary did not have an insurable interest (referring to what is now section 5862, Revised Statutes, 1939).

22. *Supra* note 19.

23. *Accord*, *English v. Reliable Life & Accident Ins. Co.*, 220 Mo. App. 837, 272 S.W. 75 (1925) and other cases considered in this text. Distinguished in *Craft v. Miller*, 72 S.W. 2d 806, 809 (Mo. App. 1934), on ground beneficiary had paid the premiums.

24. *Supra* note 16 at page 382, Situation C, and cases cited.

25. Stipulated premium plan and assessment-plan policies.

26. *Supra* note 5.

27. *Abernathy v. Springfield Mutual Ass'n.*, 284 S.W. 198 (Mo. App. 1926).

Plaintiff's counsel admitted the lack of insurable interest, but contended that since the policy was taken out by the *cestui que vie* he could name anyone he wanted to as the beneficiary of the proceeds of the policy, and that this was not in contravention of the statute. The St. Louis Court of Appeals said that this contention was clearly unsound and used the following language:

"The statute undertakes to define who shall be eligible as beneficiaries in policies issued by corporations doing business on the assessment plan, and expressly excludes every person having no insurable interest in the insured life. The statute expressly inhibits the issuance of a policy upon any life in which the beneficiary named has no insurable interest, and the policy in suit, having been issued in contravention of the express inhibition of the statute, is *invalid and void*."<sup>28</sup> (Emphasis supplied.)

This case has been strictly adhered to by the courts in the cases which have followed.<sup>29</sup>

### III

Having seen that the statutory provision in respect to insurance policies issued under the assessment plan has been rigidly enforced, let us now look to see what the rule is in regards to stipulated premium plan policies. Here again we have a statutory provision affecting the issuance of policies.

"No corporation, company or association transacting business under the provisions of this article shall issue a certificate or policy to any person . . . unless the beneficiary named in the certificate or policy is the husband wife, legal representative, relative, heir, creditor, or legatee of the insured or who may have an insurable interest in the insured."<sup>30</sup> (Emphasis supplied.)

Once again we must look to the wording of the statute to see whether or not the *cestui que vie* can procure insurance on his own life and name anyone whom he wishes as the beneficiary without regard to insurable interest. Upon a comparison with the statute controlling the issuance of assessment plan policies there seems to be very little difference in the wording as to the part italicized and the actual wording of the statute in the prior instance. It is true that there is a considerable widening of the possible beneficiaries, but there are still no words controlling the situations where the *cestui que vie* secures a policy on his life, pays the premiums,

28. *Id.* at 202.

29. *Accord*, *Reed v. Missouri Mutual Ass'n.*, 5 S.W. 2d 675 (Mo. App. 1928), policy void if issued in contravention of statute, the *cestui que vie*, being over 60 years of age, and *Walker v. General American Life Ins. Co.*, *infra* note 38.

It has further been pointed out that this matter of insurable interest in the beneficiary is an affirmative defense to be pleaded by the insurance company, and does not have to be alleged in the original petition for relief. *Dieterle v. Standard Life Ins. Co.*, 119 S.W. 2d 440 (Mo. App. 1938).

The St. Louis Court of Appeals further held that the insurable interest of the beneficiary was a question of fact for the jury, and that it was error for the trial judge to find, as a matter of law, that the beneficiary under an assessment plan policy had no insurable interest in the life of the *cestui que vie*.

30. *Supra* note 6.

and names a non-related ward who is not legally adopted as his child, or names a paramour, or others similarly situated, as the beneficiary of the policy.

The prohibition in the statute just quoted is also directed to the issuance of the policy. It absolutely prohibits a policy taken on the stipulated premium plan being issued where the beneficiary is not one of the several named classes of beneficiaries, or who has an insurable interest in the life of the insured (*cestui que vie*). It does not in terms make such a policy void. No penalty is prescribed for its violation. Here again, it is arguable that the statute does not affect the validity of policies and is enforceable only against the insurance company.

The precise question of whether this statute, like the similar assessment-plan statute, makes prohibited policies void, has never been raised in Missouri. As early as 1906, however, the St. Louis Court of Appeals in the case of *Locher v. Kuechenmeister*<sup>31</sup> said:

"... it is the rule with us that one may, of his own free will, in good faith, insure his life, paying the premiums therefor himself, for the benefit of another, who has no insurable interest therein, and the policy will be held valid."<sup>32</sup>

Here the court required that the procurement of such a policy and the naming of such beneficiary be done in good faith. It will be remembered that there is no such requirement in the statute governing the issuance of such policies, and it should be noted that the statute had been the law of this state for some seventeen years when this case was decided. The language of the court also expressly says that the beneficiary need have no insurable interest yet the statute says that he must have an insurable interest, or be a member of one of the listed classes of beneficiaries. The beneficiary named was a brother of the *cestui que vie* so the language in this respect was dictum and probably too broad.

Still in *King v. Metropolitan Life Ins. Co.*<sup>33</sup> the same court allowed a recovery by a beneficiary who was not a relative of the *cestui que vie* and did not fit the description of any of the classes of beneficiaries provided for in the statute. The court stated that the lack of insurable interest was a matter of affirmative defense, and had not been properly raised. It may be that had the defense been specifically pleaded, the result would have been different. No hint to this effect is made in the language used.<sup>34</sup>

Again in *Tinsley v. Washington National Ins. Co.*<sup>35</sup> the St. Louis Court of Ap-

31. 120 Mo. App. 701, 98 S.W. 92 (1906).

32. *Id.* at 98. The action here was on a promissory note which had been given in payment of insurance premiums. The defense was that the note was void because the insurance policy was void, the premiums being paid by one brother on insurance on his other brother. The court held this defense untenable.

33. 211 S.W. 721 (Mo. App. 1919).

34. *Id.* at 722,

"While it is true that one who has no interest by relationship or otherwise in the insured cannot take out a policy on the life of a party, any one has a right voluntarily, to designate a beneficiary," citing *Lee case, supra* note 19.

35. 97 S.W. 2d 874 (Mo. App. 1936).

peals permitted one who did not have an insurable interest in the life of the insured to recover the proceeds of an insurance policy taken out by the *cestui que vie* naming her as the beneficiary of the policy. It was shown here that the plaintiff had paid some of the premiums on the policy for the benefit of the *cestui que vie*. The language of the court is worthy of note:

"Conceding that so far as this record shows she had no insurable interest in the life of the insured which would have supported a policy on his life if taken out by her, the admitted fact is that the policies in suit were taken out by the insured himself, and not by plaintiff. Consequently the matter of the relationship of plaintiff to the insured becomes of no consequence in the case, since it was entirely proper for the insured himself, in taking out his policies, to designate plaintiff or anyone else he chose as the beneficiary therein, and this regardless of the fact that such beneficiary may have lacked a pecuniary or otherwise insurable interest in his life."<sup>36</sup>

The language of this court is even more broad than that used in the earlier

cases just mentioned. It makes no requirement of good faith of the *cestui que vie* in the naming of the beneficiary, and seems to ignore the statute completely. It is not clear what type of policy was sued on, but it has been assumed that the policy was one under the stipulated premium plan of insurance. It clearly was not one issued by a fraternal benefit society.

These cases make it reasonably clear that the statute is to be ignored, or if noticed, not applied where the insurance is taken out by the *cestui que vie*. Still later in *Sims v. Missouri State Life Ins. Co.*<sup>37</sup> the policy of insurance was payable to one "Annie Sims, wife." The plaintiff, the lawful wife of the *cestui que vie*, but who did not fit the description as beneficiary, sued to collect the proceeds of the policy. The court denied recovery, the insurance company having paid the proceeds to one "Annie Bell Sims" who was the woman living with the *cestui que vie* at the time the policy was issued, and who was known among the townspeople as the wife of the *cestui que vie*. The St. Louis court noted that it had not been suggested that "Annie Bell Sims" was not entitled to the money if she was the person whom the *cestui que vie* intended to name as beneficiary, and that even though she had no insurable interest in the life of the *cestui que vie* the policy was not a wagering contract since she was not the one who procured the policy.

The precise question of recovery by one not having an insurable interest was not involved, but the holding of the court has been cited as authority for the proposition that one may insure his own life for the benefit of anyone regardless of insurable interest. This may only indicate that such a policy, when issued, is not void, but only voidable at the will of the insurance company since it, and it alone, can bring up the question of insurable interest in the beneficiary, the question being one of affirmative defense. Clearly this case stands for the proposition that no one else may complain of the lack of insurable interest, since the plaintiff here was non-suited, and the insurance company was protected in its payment to one not having an insurable interest in the life of the *cestui que vie*.

36. *Id.* at 876.

37. 23 S.W. 2d 1075 (Mo. App. 1930).

The latest case appearing in the reports involving the question is *Walker v. General American Life Ins. Co.*<sup>38</sup> Here the policy sued on was issued on the life of one "John Parker," payable to "Elizabeth Parker, wife of John Parker." The name John Parker was an alias of the plaintiff's husband and she here sued to recover on the policy, saying that the description of "wife" should be controlling, and that the court should not lend its aid to, and encourage, the immoral relations of a man and woman, by the promise of pecuniary gain. The plaintiff did not allege any precedent for her contention but said that the court should assert itself, and prohibit such transactions as that involved here.

The supreme court held that the demurrer to the complaint was properly sustained and stated that:

"There can be no doubt that every person has an insurable interest in his own life and that he may insure it for the benefit of any person whom he sees fit to name as beneficiary."<sup>39</sup>

The court noted that there was an express requirement that the beneficiary have an insurable interest in the case of insurance on the assessment plan. The court's language that followed was well put and should leave little question in the mind of the reader as to the situation which is the subject matter of this note:

"The rule stated is but a corollary of the general proposition that any person of legal age, having the mental capacity to understand the nature of the transaction, may be the donor of his own property and give it to whom he pleases, subject only to the rights of existing creditors or others lawfully interested therein. . . . The fact that a person may give his property to unworthy causes, use it in the furtherance of unworthy enterprises, or name a paramour as the beneficiary of his insurance, is no ground for it being taken from them by the court and applied to the discharge of the owner's moral obligations contrary to such owner's express direction and intent as evidenced by will or insurance contract."<sup>40</sup>

This language would settle the question brought up in this note, and so it appeared to the writer of a case note on the principal case,<sup>41</sup> were it not for the fact that there was no mention of Section 5882, Revised Statutes, and the further fact that the right of the beneficiary to recover was not presented. The court merely held that this plaintiff had no cause of action against the insurance company for the money due under the policy where she was not named the beneficiary. The court, by implication, seems to say that the beneficiary could recover, even though not a relative and lacking an insurable interest in the life of the *cestui que vie*, by the use of the analogy to gift of other personal property. Definitely, though, it can

38. 141 S.W. 2d 785 (Mo. 1940).

39. *Id.* at 787.

40. *Ibid.*

41. 6 Mo. L. Rev. 221, 223 (1941) where the writer said:

"Missouri statutes provide that no insurance company shall issue an insurance policy upon the life of any person in which the beneficiary named has no insurable interest, but these statutes have never been applied to hold invalid a policy which was procured by the insured and made payable to one having no insurable interest in his life."

be said that the court answered the possibility as to who may attack the lack of insurable interest, in holding that one morally entitled to the fund, could not recover on the policy where the beneficiary had no insurable interest in the life of the *cestui que vie*. The question is still open as to the right of the beneficiary to recover, and what is to be done with the proceeds in case the court should be inclined to interpret the statute as the assessment-plan statute has been interpreted, and hold that a beneficiary who did not have an insurable interest in the life insured could not recover.

#### IV.

The rule as to assignments of policies seems to be fairly well settled. Where the policy is procured by a beneficiary having no insurable interest, the policy is void and consequently any attempted assignment is void. Where the policy is secured by the *cestui que vie* and assigned to one having an insurable interest, the policy and assignment are valid. Where the policy is taken out by the *cestui que vie* and assigned to a creditor the assignment is invalid except as to the amount of the debt due the creditor. Where a similar policy is assigned to a *bona fide* purchaser for value, the assignment is valid and the purchaser can recover the full amount provided the difference between value paid and the total proceeds is not too great. As has been seen the Missouri decisions all have an undercurrent in them requiring that the assignee must have some type of insurable interest in the *cestui que vie*. This requirement is a holdover from the indemnity theory of insurance.

As to assessment-plan policies it is clear that the beneficiary named in the policy must have an insurable interest in the life insured or the policy is void. The statutory requirement is strictly enforced, and it appears that an assignment of this type of policy to a person who did not have an insurable interest in the life insured should be absolutely void; the reason being that a person may not do indirectly what he cannot do directly. However, no distinction has been made between the types of policies.

As to stipulated premium plan policies the courts have, by way of dicta, said that the *cestui que vie* who procures the policy himself can name anybody he wants to as the beneficiary therein. But the statute governing such policies prohibits their issuance unless the beneficiary is a member of a listed class or has an insurable interest. By the express language of this same statute one can name a creditor as beneficiary apparently without regard to the amount of the debt. Is there any reason why this should be the rule, and yet the *cestui que vie* not be allowed to assign to a creditor without regard to the amount of the debt? It would seem not, yet this appears to be the law of this state.

It may be, and quite possibly will be, that the precise question considered by this article will never arise in the courts of the state since the only one who can question the insurable interest, or lack of it, is the insurance company which issues it. Even if the question were to arise, it may be that the insurance company would be barred by the clause of Section 5882 making a policy issued under it incontestable after the policy has been in force a year or over. As a general rule, how-

ever, the lack of insurable interest cannot be waived by the insurer,<sup>42</sup> nor is the insurance company estopped to assert it.

The practicing attorney may escape litigation if he advises his client to make the proceeds payable to a trustee who is a relative to hold for the ward or paramour. But there would be some question as to the advisability of naming a trust company or other person or entity not having an insurable interest as the trustee. If the statute were read literally the trustee in this circumstance could not recover. It should be noted that one case has said that the insurable interest required by Section 5882 need only exist at the date when the policy is issued.<sup>43</sup> This might be another method of escaping a questionable arrangement, *i.e.* name a relative or even the *cestue que vie's* own personal estate as the beneficiary in the original issue, and then change the beneficiary to the ward or the paramour.

The confusion is patent and the courts of the state or the legislature should clarify the rules as to all the situations. Until the legislature speaks, however, it seems that the courts should not ignore Section 5882 or permit the insurance companies to ignore it as is now done. It should be enforced the same as any other statute. It is not for the courts to determine the policy of the law where the legislature has expressly declared what that policy is to be. It has been held that a similar statute in the state of Indiana was within the constitutional powers of the legislature.<sup>44</sup> If the statute is constitutional, the courts should enforce it according to the letter, and the letter of the statute contains no exception and permits no exception where the *cestui que vie* takes out the policy himself and makes one having no insurable interest the beneficiary. The statute prohibits absolutely the issuance of such policies. The court should hold such policies void until the legislature acts to change the rule.

N. JAY BRANTLEY

#### USE OF OPTIONS TO PURCHASE LAND TO CONTROL OCCUPANCY

In view of the recent decision of the United States Supreme Court that racial covenants could not be enforced by the courts,<sup>1</sup> the case of *Lux v. Lewis*<sup>2</sup> should be of interest to the Missouri lawyer. In the *Lux* case the deed to a certain lot in Jackson County contained the following covenant:

"No sale of said lot shall be consummated without giving at least 15 days' written notice to grantor, and the owners of the two lots adjoining said lot on the sides, of the terms thereof; and any of them shall have the right to buy said lot on such terms. . . . All rights and duties of the grantor hereunder shall pass to and bind its successors and its assigns other than individual residence lot owners."

42. 29 AM. JUR. *Insurance*, §§ 292, 321.

43. *Alexander v. Griffith Brokerage Co.*, 229 Mo. App. 773, 73 S.W. 2d 418, 424 (1934).

44. *Salem Lodge No. 21, F. & A. M., Appt. v. Swails*, 209 Ind., 347, 197 N.E. 837 (1935), 108 A.L.R. 444 (1937).

1. *Shelly v. Kraemer*, 334 U. S. 1 (1948).

2. 213 S.W. 2d 315 (Mo. 1948).

The grantee, however, sold the lot to the defendants who were not the adjoining property owners or the grantor. The plaintiff, one of the adjoining property owners, then brought suit to have the title taken out of the defendants and vested in the plaintiffs upon their payment to the defendants or into court for their benefit, of the same consideration that was paid by the defendants to their grantors. In deciding this case the Supreme Court of Missouri found that the plaintiffs had not exercised their option, thus they found it unnecessary to determine the validity of the restrictive covenant.

It is unfortunate that the court did not find it necessary to determine the validity of the restrictive covenant for its validity should be a matter of interest to the attorneys of Missouri. If covenants such as this one are valid, then it may be possible to use a covenant granting an option, unlimited in duration, to repurchase in the event of sale, coupled with an option to rent if the grantee desires to rent or lease, to control the occupancy in spite of the United States Supreme Court decision in *Shelly v. Kraemer*.<sup>3</sup> Since the court did not determine the validity of such an option it will be the purpose of this comment to inquire into its validity.

In determining the validity of an option, unlimited as to time, given by the grantee to the grantor the problem as to whether or not such an option violates the Rule against Perpetuities arises. Thus before going further it will perhaps be best to look briefly at that rule.

The Rule against Perpetuities is of English origin. It first took form in England in the decision of cases arising on executory devises of chattels real, and was suggested at the bar in 1616, although the "perpetuity" had appeared in English reports as far back as 1595.<sup>4</sup> It was not until 1891,<sup>5</sup> in the case of *Lockridge v. Mace*,<sup>6</sup> that the Rule against Perpetuities was given a clear application in Missouri. In that case the rule was stated in this way:

" . . . lands cannot be limited in any mode so as to be locked up from alienation beyond the period of a life or lives in being and twenty-one years after, allowing the period of gestation in addition of a child *en ventre sa mere*, who is to take under such limitation."

A modern and more easily understood statement of the same rule appears in American Jurisprudence.<sup>7</sup> In that work the rule is stated as follows:

"The rule against perpetuities prohibits the creation of future interests or estates which by possibility may not become vested with a life or lives in being at the time of the testator's death or the effective date of the instrument creating the future interest, and twenty-one years thereafter, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth."

3. *Shelly v. Kraemer*, *supra* n. 1.

4. *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914).

5. 3 U. of Mo. BULL. L. SER. 13 (1914).

6. 109 Mo. 162, 18 S.W. 1145 (1891).

7. 41 AM. JUR. 50, § 3 *Perpetuities and Restraints on Alienation*.



The Rule against Perpetuities is concerned with property only, and therefore it does not affect contracts which do not create any interest or estate in property.<sup>8</sup> It is also well settled that the rule applies only to future contingent estates and has no application to estates already vested.<sup>9</sup> This being settled our problem becomes one of determining whether or not an option creates an interest or an estate in property, and if such interest is created, whether or not it is contingent or vested. Unless we find that the option does create an interest which is not vested, then the option cannot violate the Rule against Perpetuities; on the other hand, if we do find that the option creates such an interest, then it must be held invalid as a violation of the Rule against Perpetuities.

However, this problem is not as simple as it may seem, and it is one upon which the courts in this country do not agree. One of the leading cases supporting the validity of such an option is *Keogh v. Peck*,<sup>10</sup> which arose in Illinois. In that case an option to purchase certain premises for \$10,000 at any time during the term of the lease was contained in a ninety-nine year lease, and the lessee sought specific performance. As a defense the lessor interposed the Rule against Perpetuities. The court, however, found that the option was not a violation of the rule, saying:

"In this state no title, legal or equitable, is granted, and no interest in land is created in the holder of the option by an option agreement."

The same result was reached by the Supreme Court of Michigan in *Windiate v. Leland*.<sup>11</sup> There an option was given for the purchase of land in the event of a sale. The court, after pointing out that the option was not invalid as a restraint on alienation since Michigan did not follow the common law but prohibited only absolute restraints, said that the option did not convey any interest to the holder of the option before it was acted upon. Other American cases can be cited upholding the validity of options under the Rule against Perpetuities,<sup>12</sup> but it is not certain that they can be said to represent the majority opinion in the United States. Certainly they do not represent the majority English opinion.<sup>13</sup>

The leading English case regarding the validity of an option to repurchase land is *London & S.W. Ry. v. Gomm*<sup>14</sup> which overrules the cases of *Birmingham Canal Co. v. Cartwright*.<sup>15</sup> In the *Gomm* case the railroad sold certain land to

8. 41 AM. JUR. 78, § 35 *Perpetuities and Restraints on Alienation*; GRAY RULE AGAINST PERPETUITIES § 329 (2d ed. 1906).

9. 41 AM. JUR. 73, § 29 *Perpetuities and Restraints on Alienation*; *Gates v. Seibert*, 157 Mo. 254, 57 S.W. 1065 (1900).

10. 316 Ill. 318, 147 N.E. 266 (1925); see also *Gall v. Stoll*, 259 Ill. 174, 102 N.E. 225 (1913).

11. 246 Mich. 659, 225 N.W. 620 (1929).

12. *Mineral Land Investment Co. v. Bishop Iron Co.*, 134 Minn. 412, 159 N.W. 966 (1916); *Buck v. Walker*, 115 Minn. 239, 132 N.W. 205 (1911); *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587 (1902).

13. *London & S.W. Ry. v. Gomm*, 20 Ch. D. 562 (1882).

14. *Ibid.*

15. 11 Ch. D. 421 (1879).

one Powell. The deed to Powell contained an option giving the railroad the right to re-purchase the land if it became necessary. The option was clearly unlimited as to time. Powell in turn sold the land to Gomm who had notice of the covenant. As a defense to an action for specific performance of the covenant defendant Gomm contended, among other things, that the covenant violated the Rule against Perpetuities. In determining that the rule did apply to this case, Jessel M. R. said:

"Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter into the contract, but is only a purchaser from *Powell* who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land."

Thus it was held in England that an option to re-purchase land unlimited as to time was void.

*Barton v. Thaw*,<sup>16</sup> a Pennsylvania case, is a leading American case supporting the English doctrine. This case presented for the first time the question as to whether an option to purchase land, unlimited in point of time, violated the Rule against Perpetuities and was void. The court, after a discussion of the rule, held that the option did create an interest in the land in the holder of the option, and that the interest was not such a vested interest so as to avoid the Rule against Perpetuities. On that basis the Pennsylvania court has held that an option to purchase land, unlimited in point of time, is void as a violation of the Rule against Perpetuities. In *H. J. Lewis Oyster Co. v. West*<sup>17</sup> the Supreme Court of Errors of Connecticut also held that an option, unlimited as to time, given by the owner of land to his grantor whereby the grantor was to have first chance on the land in the event of a sale gave the grantor an interest in the land. In answering the contention that the interest was vested and thereby outside of the Rule against Perpetuities, the court said:

"The definition of a vested remainder is one where the remainderman is certain to come into possession immediately upon the determination of the precedent estate."

Under this definition of the term, it is clear that the holder of the option does not have a vested interest since the precedent estate may never terminate if the owner does not wish to sell. Thus all that the owner of the option could have is a contingent interest in the land. This interest is, of course, subject to the Rule against Perpetuities, and if there is any possibility that it will not vest within the

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16. 246 Pa. 348, 92 Atl. 312 (1914); see also *Strasser v. Steck*, 216 Pa. 577, 66 Atl. 87 (1907); *People's Street Ry. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113 (1893); *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526 (1850), which hold that an option to purchase creates an interest in land.

17. 93 Conn. 518, 107 Atl. 138 (1919).

period prescribed by the rule it is void. In West Virginia<sup>18</sup> it has also been decided that an option of unlimited duration gives the optionee a present right to an interest in the land, which is not vested and which may arise at a period beyond the limit fixed by the Rule against Perpetuities.

American cases can be found on either side of this issue, and there is no agreement among authorities as to which view is the majority view in the United States. Although no Missouri case has been found on this point, it seems that we can determine which way Missouri is most likely to hold if and when a case need be decided upon this point. The authorities seem to agree that the Rule against Perpetuities will apply to any contingent future interest in land which may not vest within the time prescribed by the rule. Thus the question as to how Missouri would hold on an option, unlimited as to time, to purchase land seems to become simply this. Does such an option create a contingent future interest in the subject of the option in Missouri? If it does, then it is affected by the Rule against Perpetuities and must be so set up that it must vest, if at all, within the period prescribed by the rule. On the other hand, if we find that the option does not create a contingent future interest in the subject of the option, then it can not be affected by the Rule against Perpetuities.

Does an option to re-purchase land create a contingent future interest in the land in Missouri? To answer this question we turn to the Kansas City<sup>19</sup> case which led into this inquiry. In that case the plaintiff had only an option to purchase the land. Yet he seeks to have the title taken out of the defendant, who was not a party to the covenant giving plaintiff the option, and transferred to him. The fact that the court considered the case seems to indicate that the option creates a specifically enforceable contract in favor of the holder of the option. Such a specifically enforceable contract, it seems, might well be considered an interest in land. But is that interest contingent or vested? An interest is vested when there is a present fixed right of future enjoyment.<sup>20</sup> In the case of an option to purchase land the optionee has no such fixed right to future enjoyment. The sale may never be made and the holder of the option may never come into possession of the land. This being true, the interest of the option holder is a contingent future interest.

Thus it seems that an option to purchase land creates a contingent future in the land in Missouri. Therefore, it does not seem that it would be advisable to use an option agreement such as that previously set out in this discussion to avoid the rule of *Shelly v. Kraemer*.<sup>21</sup> We must remember that the common law Rule

18. *Starcher Bros. v. Duty*, 61 W. Va. 371, 56 S.E. 527 (1907). See also *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S.E. 89 (1923); *Turner v. Peacock*, 153 Ga. 870, 113 S.E. 585 (1922); *Woodall v. Bruen*, 76 W. Va. 193, 85 S.E. 170 (1915), which follow *Starcher Bros. v. Duty*, *supra*.

19. *Lux v. Lewis*, *supra* n. 2.

20. 3 BOUVIER'S LAW DICTIONARY 3397 (3d ed. 1914).

21. *Shelly v. Kraemer*, *supra* n. 1.

against Perpetuities is still in effect in Missouri,<sup>22</sup> and that it is a positive rule of law and not one of construction.<sup>23</sup> Thus if a limitation violates the rule as apparently the proposed option would, it will be struck down, no matter what the grantor had intended.

It would seem that the safer practice would be to draft options so that they are exercisable, if at all, only within a period of lives in being and 21 years.

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22. In the following states the common law rule against perpetuities has been modified by statute: Alabama, Arizona, California, Idaho, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, New York, North Dakota, Oklahoma, South Dakota and Wisconsin.

23. GRAY, RULE AGAINST PERPETUITIES § 629 (2d ed. 1906).